No. 2812.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOSEPH B. KATZ,
Appellant,

vs.

COMMISSIONER OF IMMIGRATION at the Port of San Francisco, California,
Appellee.

OPENING BRIEF ON BEHALF OF APPELLANT

Upon Appeal from the United States District Court for the Southern Division of the Northern District of California, First Division.

MARSHALL B. WOODWORTH,
Attorney for Appellant

S. LUKE HOWE,
Of Counsel.

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STATEMENT OF THE CASE.

Appellant appeals from the order and judgment of the lower Court sustaining the demurrer interposed to his petition for a writ of *habeas corpus.*

(Transcript of Record, pp. 22-23.)

Appellant is an alien and was arrested by the Immigration Officials at Angel Island, California, and ordered deported to the Kingdom of Great Britain and Ireland on the charge of having been "found receiving, sharing in, or deriving benefit from the earn-

ings of a prostitute, or prostitutes," in violation of Section 3 of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910 (36 Stats. 263).

The particular portion of Section 3 of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, involved upon this appeal provides:

> "Any alien * * * who shall receive, share in, or derive benefit from any part of the earnings of any prostitute * * * shall be deported, etc."

The facts adduced before the Immigration Officials showed that the appellant was the owner of a small piece of real estate and the house thereon in Colfax, California, which one Nellie White—a prostitute—rented from him and paid him a monthly rental of $25.00. In other words, he was merely the landlord and the sum of $25.00 per month was a proper and reasonable rental for the house. The only relation existing between himself and Nellie White was that of landlord and tenant. The record of the proceedings before the Immigration Officials, attached to the petition for the writ of *habeas corpus,* shows that appellant, Joseph B. Katz, plied his trade in Colfax, California, as a barber. His industry, thrift and respectability are vouched for by leading citizens of Colfax, California.

Any imputation that Joseph B. Katz had any interest in the earnings or profits derived from the operation or management of the place as a house of prosti-

tution is not sustained by any legitimate, substantial, or competent evidence.

Needless to say, that surmise, conjecture, rash inferences, or even mere probabilities, do not afford a substitute for some competent evidence, upon which to inflict on an alien, who has sought an asylum in this country, such drastic punishment as banishment.

As was said in *Hanges* v. *Whitfield,* 209 Fed. Rep. 675, *679-680*: The examination "must be a lawful proceeding, the charge established *by competent evidence,* and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them." * * * "and but emphasizes the necessity of Immigration Officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, *except upon legal evidence,* which establishes, with reasonable certainty, at least, the charges upon which it is sought to deport them."

As was also well said in *Ex parte Lam Pui,* 217 Fed. Rep. 456:

> "It is also elementary that mere suspicion, conjecture, speculation is not evidence, neither can it be made the basis for finding a fact in issue:

This Circuit Court of Appeals announced the same views in *Backus* v. *Owe Sam Gow,* 235 Fed. Rep. 847, 853-4:

> "But mere suspicion or conjecture were not sufficient upon which to base a judgment * * * In the absence of the best evidence obtainable to sustain the same, we may also conclude that the

order of deportation was arbitrary and unfair, and subject to judicial inquiry. (Citing *United States* v. *Ju Toy,* 198 U. S. 253, *260,* 25 Sup. Ct. 644, 40 L. Ed. 1140; *Chin Yow* v. *United States,* 208 U. S. 8, *12,* 28 Sup. Ct. 201, 52 L. ed. 369; *In re Chan Kan,* 332 Fed. 855, *857*—C. C. A. — and cases therein cited.)

The dominant idea and theory of the Immigration Officials, upon which they seek to justify the warrant of deportation, is that the appellant, as an alien, is subject to deportation for the reason, if for no other, that he occupied the status of landlord and received a monthly rental of $25.00 from Nellie White, admittedly a prostitute, said $25.00 being received and paid to him by Nellie White as rent and for nothing else.

In other words, the theory of the Immigration Officials, upon which they acted and based the warrant of deportation, was that an alien landlord who receives rent from a prostitute comes within the inhibition of Section 3 of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, and was, in effect, receiving, sharing in, and deriving benefit from the earnings of a prostitute, rendering him liable to deportation.

Exception was taken by appellant to such a broad, harsh and unjust interpretation of the law by the Department of Labor, and a petition for a writ of *habeas corpus* was sued out in the Court below.

(See Petition for Writ of *Habeas Corpus,* Transcript of Record, pp. 2-13.)

The appellee interposed a demurrer, which was sustained.

(Transcript of Record, pp. 20-23.)

The reasons given by the learned judge of the lower Court are contained in a very brief opinion, which is as follows:

> "The record here shows that Joseph B. Katz is the owner of the house in Colfax; that the same was a house of prostitution; that he knew it, and that he received rent for the house from Nellie White, one of the inmates. I *think* this brings him within the terms of the statute as deriving 'benefit from the earnings of a prostitute.' The demurrer to the petition will therefore be sustained, and the application for a writ denied." (Italics ours.)

(Transcript of Record, p. 22.)

No authorities were cited by the Court below. Indeed, we understand that this is a pioneer case as to the particular interpretation of that portion of Section 3 of the Act of February 20, 1907, as amended by the Act of March 26, 1910. The Department of Labor has never before gone to the extreme limit of holding that an alien, who is merely the owner and landlord of the premises rented by prostitutes, and who only receives money as rent and who has no other interest in the earnings of a prostitute than merely and only as a landlord, is amenable to the severe and drastic punishment of deportation imposed by the Act.

ARGUMENT.

Banishment is a most severe and drastic punishment. A statute imposing such penalty is highly penal and must be strictly construed. Immigration acts, containing such penal provisions, should, as held by the United States Supreme Court, be strictly interpreted.

As was well said in the case of *Hackfeld* v. *United States,* 197 U. S. 442, in interpreting an Immigration Act:

> "This is a highly penal statute, and we think the well known rule, as laid down by Mr. Chief Justice Marshall in *U. S.* v. *Wiltberger,* 5 Wheat. 76, 95, is applicable here: 'The rule that penal statutes are to be strictly construed is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individual.' "

Keeping this cardinal rule of statutory interpretation in mind, we enter, very briefly, upon a discussion of the proposition involved in the present appeal.

The Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910 (36 Stats. 263), Section 3 thereof, does not specifically provide that alien landlords, receiving money from prostitutes for *rent* as such landlords, *and in no other capacity,* should be deemed to be "found receiving, sharing in, or deriving benefit from the earnings of a prostitute."

> (See Warrant of Arrest, Transcript of Record, p. 5; also Exhibit "A," p. 1, Original Exhibits.)

It is only by inference, and, we submit, the most

illogical, irrational and unfounded inference that such a view can be taken of the law.

Even the learned judge of the Court below ventures his dubiousness of the correctness of such view, by qualifying his opinion with the significant statement:

> "I *think,*" says the learned judge, "this brings him within the terms of the statute as deriving 'benefit from the earnings of a prostitute.'" (Italics ours.)
>
> (Transcript of Record, p. 22.)

We submit, with the utmost respect for the views of the learned and eminent judge of the Court below, that he went much further, in his ruling in this case, than is permitted by the well settled canons of statutory construction in construing highly penal statutes.

If the views of the Court below be correct, then every alien conductor of a railroad or street car who receives fare from a prostitute, knowing her to be such, is subject to deportation as "deriving benefit from the earnings of a prostitute." Every alien butcher or baker or candlestickmaker, who sells his meat, or bread, or chandelle to a prostitute, knowing her to be such, is liable to banishment as "receiving the earnings of a prostitute." Every alien dressmaker or modiste, who is paid for dresses or hats by a prostitute, knowing her to be such, is subject to deportation as "sharing in the earnings of a prostitute." In fact, every alien, who receives any of the earnings of a prostitute, knowing her to be such, for furnishing her with the very necessaries of life, or who has any legitimate, financial or commercial dealings with a

prostitute, would be amenable to the drastic penalty of Section 3 above referred to.

We maintain that it is illogical and irrational to impute to Congress, in the enactment of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, such absurd, harsh, mischievous and unjust results. Such results should not be tolerated, if any other sensible and reasonable construction of that particular clause of Section 3 of the Immigration Act in question will permit, compatible with the object of the law.

It is the well settled rule of statutory construction, that, where the language of a statute is ambiguous or otherwise doubtful, or, being plain, a literal construction would lead to such absurdity, hardship or injustice, as to render it irrational to impute to the law making power a purpose to produce or permit such result, that construction should be adopted which will avoid such absurdity, hardship or injustice.

Moffitt v. *United States,* 128 Fed. 375, 63 C. C. A. 117;
United States v. *Kirby,* 7 Wall. 482, 19 L. ed. 278.

The object of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, was to exclude the admission into the United States of certain classes of undesirable aliens; idiots, imbeciles, etc., paupers, persons likely to become public charges, professional beggars, persons afflicted with loathsome or contagious diseases, criminals, polygamists, anarchists, prostitutes, *"persons who are supported by or*

receive in whole or in part the proceeds of prostitution." (See Section 2 of the Act.)

While Section 2 of the Act as amended is designed to prevent from *entering* into the United States undesirable aliens, Section 3 thereof relates particularly to the importation of prostitutes and to the deportation, *after entry* into the United States, of prostitutes, pimps and persons generally of the demi-monde class. Severe penalties are imposed for the importation of women for immoral purposes and the drastic punishment of banishment is imposed on alien prostitutes and pimps. Section 3 of the Act of February 20, 1907, (34 Stats. 898) as amended by the Act of March 26, 1910 (36 Stats. 263), reads as follows:

> "Sec. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. Jurisdiction for the trial and punishment of the felonies hereinbefore set forth shall be in any district to or into which said alien is brought in pursuance of said importation by the person or persons accused, or in any dis-

trict in which a violation of any of the foregoing provisions of this section occur. *Any alien* who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or *who shall receive, share in, or derive benefit from any part of the earnings of any prostitute,* or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this Act. That any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section, attempt thereafter to return to or to enter the United States shall be deemed guilty of a misdemeanor, and shall be imprisoned for not more than two years. Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this Act. In all prosecutions under this section the testimony of a husband or wife shall be admissible and competent evidence against a wife or husband."

A mere reading of Section 3 will convince this Appellate tribunal that the sole purpose and object of this provision was to apply to prostitutes, pimps and persons of the demi-monde class and not to aliens generally who may have financial or commercial dealings with that class of people.

A comparison of Sections 2 and 3 confirms this view. Section 2 excludes, among others, *"persons who are supported by or receive in whole or in part the proceeds of prostitution."* Section 3 seeks to deport the same class of persons when it speaks of "any *alien * * * who shall receive, share in or derive benefit from any part of the earnings of any prostitute."* Both sections, obviously, refer to that class of human beasts who live off the earnings of fallen women derived from prostitution and acts of sexual immorality.

Therefore, we maintain that the words or language employed in Section 3:

> "Any alien * * * who shall receive, share in, or derive benefit from any part of the earnings of any prostitute,"

should be construed to apply solely and exclusively to that class of alien persons known as pimps—maquereaux—persons of the demi-monde class—who are supported or live off the earnings of fallen women.

The application of the rule of statutory construction known as *"ejusdem generis"* is controlling in this case and limits the general language used in Section 3—now under consideration—to the class of persons previously enumerated in Sections 2 and 3, to-wit: *"prostitutes," * * * "persons who are supported by or receive in whole or in part the proceeds of prostitution."*

Where general words follow the enumeration of particular classes of persons or things, they will be

construed as applicable only to persons or things of the same general nature or class as those enumerated, under the rule of construction known as *"ejusdem generis."*

> Cyc., Vol. 36, pp. 1119-1122 and cases there collated.

This rule is especially applicable to statutes defining crimes and regulating their punishment.

> *State* v. *Erwin,* 91 N. C. 545;
> *Lane* v. *State,* 39 Ohio St. 312;
> *Ex parte Muckenfuss,* 52 Tex. Cr. 467, 107 S. W. 1131;
> *State* v. *Goodrich,* 84 Wis. 359, 54 N. W. 577;
> *Reg.* v. *Reid,* 30 Ont. 732.

Limited to that despicable class of human beasts—to alien persons who live off, or are supported by, the earnings of prostitutes—to alien persons of the demi-monde class—the Sections of the Act as amended are given a reasonable, sensible and harmonious interpretation, and one, we add, well calculated to carry into effect the salutary provisions, in that respect, of the Immigration laws of the United States.

But, to give the Act as amended the broad interpretation adopted by the learned Judge of the Court below and make it applicable, in effect, to every alien who has any financial or commercial dealings with prostitutes, for instance an alien landlord who receives his rent from a prostitute, or an alien butcher or an alien baker who sells meat or bread to a prostitute—one of the very necessaries of life—is to lead

to such absurd, harsh, mischievous and unjust results, as to make it clear that Congress never intended such sweeping legislation.

General words or language used in a statute must be construed in subordination to the purpose and object of the statute.

Holy Trinity Church v. *United States,* 143 U. S. 457;
Reiche v. *Smythe,* 13 Wall. 162;
Silver v. *Ladd,* 7 Wall. 219;
Ex parte Young, 211 Fed. R. 370;
Moffitt v. *United States,* 128 Fed. 375.

The purpose and object of Sections 2 and 3 of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, were to exclude and deport undesirable aliens, to-wit: prostitutes, pimps, and others. An alien landlord, who receives rent from a prostitute or pimp, knowing them to be such, is not, by reason of the mere fact of the relation of landlord and tenant, *undesirable.* No more so than any other alien who has legitimate, financial, commercial dealings with prostitutes, such as a railroad or street car conductor, butcher, baker, etc.

Therefore, we contend that the penal provisions of Section 3 of the Immigration Act as amended, in construing the words "shall receive, share in, or derive benefit from any part of the earnings of any prostitute," should be limited to alien persons who are directly supported by or live off the earnings of fallen women, and not to the general class of alien merchants, tradesmen, landlords, and what not, who,

incidentally and during the course of their business dealings with prostitutes, may receive moneys which were earned by unfortunate women in pursuing their nefarious calling. The words of the particular clause of Section 3, now under consideration, should be limited, not enlarged.

We have not succeeded in finding, nor has our attention been called, to any decision of the Federal Courts, construing the particular clause of Section 3 in question. However, another and subsequent portion of the same clause of Section 3 has been construed, and the rationale of that decision supports the argument we here advance.

In *Ex parte Young,* 211 Fed. Rep. 370, the words construed were: "Any alien * * * who in any way assists, protects, or promises to protect from arrest any prostitute, * * * shall be deported." This provision is part of the same clause of Section 3 of the Immigration Act as amended now under consideration. In the case cited, it was held that the charge of assisting, protecting, etc., any prostitute should be *limited to* assistance furnished such person in order to enable her to continue *to practice prostitution.* In other words, the broad and general language used in Section 3 of the Immigration Act as amended, which is a highly penal act, was *limited* to the purpose and object of the Act in *excluding* prostitutes, pimps, etc., and in *deporting* them, after their entry into the United States. A broad interpretation of the language construed in *Ex parte Young, supra,* would have, manifestly, applied to any alien

in any way assisting or protecting prostitutes however charitable or benevolent the motive of such alien.

> "It is earnestly insisted by counsel for petitioners that the words 'in any way assists, protects, or promises to protect from arrest' mean in any way assist from arrest, as by furnishing money to escape to one who is threatened with arrest. The argument is more ingenious than convincing. If such were the meaning, there are so many more apt words in which to express it that it seems unlikely that such could have been the intention.
>
> "On the other hand, if the words 'any alien who in any way assists * * * a prostitute' are given their widest meaning, so as to include an alien who gives food, shelter, or medicine to a prostitute, which, it is contended, is the only other meaning of which they are capable, a conclusion is reached which is still more abhorrent to reason. *A more satisfactory conclusion is that the intention was to declare unlawful the presence in this country of any alien who in any way assists a prostitute to practice prostitution, or towards its practice. Holy Trinity Church* v. *U. S.,* 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226."
>
> *Ex parte Young,* 211 Fed. Rep. 370, *373.*

We think that the views expressed in *Moffitt* v. *United States,* 128 Fed. 375, 63 C. C. A. 117, are apposite to, and should control, the statutory construction involved in the case at bar:

> "Immigration statutes should not be so construed as to include cases which, *although within the letter, are not within the spirit, of the law.* All law should receive a sensible construction. *General terms contained therein should be so lim-*

ited in their application as not to lead to injustice, oppression, or absurd consequence." (Italics ours.)

The same views were expressed in *Holy Trinity Church* v. *United States,* 143 U. S. 457. That case involved a provision of an immigration act which made it unlawful for any one in the United States "to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States * * * under contract or agreement * * * to perform labor or service of any kind in the United States, its Territories or the District of Columbia."

It appeared that the Holy Trinity Church made a contract with one E. W. Warren, a resident of England, to remove to the City of New York and enter its service as rector and pastor. The church was proceeded against under the act and judgment was rendered against it. (See 36 Fed. 303.)

The Supreme Court of the United States reversed the judgment, and, in an elaborate opinion by Mr. Justice Brewer, declared that: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

Furthermore, we venture the suggestion that any legislation along the lines of the broad interpretation, given by the learned Judge of the Court below to the language of the particular clause of Section 3 of the Immigration Act as amended—now under considera-

tion—would be unconstitutional. It was held in the case of *Wong Wing* v. *United States,* 163 U. S 228, 41 L. ed. 140, that aliens within the territory of the United States are entitled, equally with citizens of the United States, to the protection of the 5th and 6th amendments to the Federal Constitution.

See, also, *Yick Wo* v. *Hopkins,* 118 U. S. 369, 30 L. ed. 226.

We maintain that if the language of the particular clause—now under consideration—of Section 3 of the Immigration Act as amended is deemed applicable to every alien who receives, in a legitimate or business way, moneys from a prostitute which she has earned as such, for instance, an alien landlord, or alien butcher, or alien baker, etc., such legislation would be unconstitutional and violative of common rights guaranteed by the Constitution of the United States to all persons—alien and citizen alike—living within the territory of the United States. Such legislation would be destructive of common rights. Prostitutes, whether aliens or citizens, have a common and inalienable right to pay rent for shelter and sleep, and to the common necessaries of life. The mere fact that their earnings to pay rent or the common necessaries of life come from the degraded calling which they ply, cannot render aliens, who receive such earnings in a lawful, legitimate and business way, "undesirable" to such an extent as to render them subject to banishment.

Legislation violative of common, constitutional rights has been held void.

> *Hechinger* v. *Marysville,* 22 Ky. L. Report 486, 49 L. R. A. 114.

It is well settled that: "Ordinances have been declared illegal because their language allowed an interpretation which would cover *harmless acts*, or which failed to make exceptions that might under circumstances become necessary."

> Freund Police Power, Sec. 158;
> *Ex parte McCarver,* 39 Tex. Crim. 448, 42 L. R. A. 587;
> *State* v. *Hunter,* 106 N. C. 796, 8 L. R. A. 529;
> *Hechinger* v. *Marysville,* 22 Ky. L. Report 486, 49 L. R. A. 114.

NO EVIDENCE THAT APPELLANT RECEIVED ANY OF THE EARNINGS OF ANY PROSTITUTE OTHER THAN AS LANDLORD OR THAT HE HAD ANYTHING TO DO WITH THE MANAGEMENT OF THE HOUSE OF PROSTITUTION OPERATED BY NELLIE WHITE.

While we do not apprehend that the United States Attorney will seriously contend that there is any competent, legitimate, or substantial evidence that appellant had any interest in the house of prostitution operated in Colfax, California, by his tenant, Nellie White, *other than as landlord,* still the character of some of the affidavits presented against the appellant

and upon which the Immigration Officials acted in ordering him deported lead us, briefly, to explain them to this Appellate tribunal, so that no injustice may be done appellant.

The learned Judge of the Court below did not find as a fact, nor did he decide, that appellant had any interest in, or took any part in the management of, the house of prostitution operated by Nellie White *other than as landlord.* The case, as we have seen, was decided against appellant upon a question of law. It was determined on the theory, *and on the theory alone,* that the mere fact that he was an alien and owned the property and was paid a rental of $25 a month, which was presumed to come from the earnings of Nellie White as a prostitute, made him amenable to deportation under the provisions of Section 3 of the Immigration Act as amended.

We are satisfied that a perusal, by this Court, of the record of the proceedings before the Immigration Officials will establish that there is no legitimate, or substantial, or competent evidence to hold that the appellant had any interest in, or took any part in the management of, the house of prostitution operated by Nellie White *other than as landlord.* A complete record of the proceedings before the Immigration Officials was appended to the petition for a writ of *habeas corpus* as exhibits and, by stipulation, these exhibits were transmitted to this Court and are now on file with the Clerk in their original form, in a volume separate from the Transcript of Record, the

stipulation also waiving the printing of the same in the Transcript of Record.

(See Transcript of Record, pp. 14-18, 32-33; see original exhibits "A" to "NN" and "CCC" to "VVV," in a separate volume.

In this connection, it is not improper to call this Court's attention to the fact that the learned Judge of the Court below, in passing upon the evidence against Harry Katz, a brother of the appellant, Joseph B. Katz, who was also ordered deported by the Immigration Officials, as being the *manager* and *interested* in the *same house,* of which the appellant is the owner of the house and land, held the evidence, upon which the warrant of deportation was based against the brother, to be entirely insufficient. The evidence against both brothers was substantially the same.

Counsel for appellant was also counsel for appellant's brother, Harry Katz, in the *habeas corpus* proceedings in the Court below, and is in a position to state that the Immigration Officials endeavored to make out a stronger case against Harry Katz than they did against his brother, Joseph B. Katz, the appellant upon this appeal. They sought to deport the brother, Harry Katz, on the ground that he was the active manager of the place. But, as stated, the learned Judge held that there was "no real evidence against the petitioner" (Harry Katz).

We have incorporated in the Transcript of Record upon this appeal the opinion of the learned Judge of the Court below rendered in the *habeas corpus* pro-

ceedings instituted in behalf of Harry Katz. The opinion is instructive and persuasive inasmuch as the Immigration Officials based their order of deportation against the appellant Joseph B. Katz upon substantially the same affidavits, reports and other matters contained in the exhibits appended to the petition for *habeas corpus* instituted in behalf of the appellant, and now on file with the Clerk of this Court. Said the learned Judge, in his opinion and order overruling the demurrer to the petition for a writ of *habeas corpus* in behalf of Harry Katz, as follows:

> "The records here which accompany the petition show *no real evidence against the petitioner. The affidavits are upon information and belief, and express only the opinions of the affiants.* It is true that in this State the reputation of a house as a house of ill-fame, may be shown, but I know of no rule, here or elsewhere, which permits the ownership or management of such a house to be thus proved. There should be, in my opinion, some *fair, substantial testimony* upon which to base an order deporting from this country an alien who has lawfully entered it. The record here is too long to recite, but the closest scrutiny of it will not reveal in all the testimony taken, whether in the presence or absence of petitioner, *any competent evidence,* and by that I mean evidence *other than pure hearsay and expressions of opinion,* tending to support the finding that petitioner was *either connected with the management of a house of prostitution* or *has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes.* It may be true that the presence of petitioner in this country is displeasing to many worthy people, but he may not be deported for that reason. He can only be deported after *a fair hearing,* and then only when

the order deporting him finds support in something other than *mere hearsay and opinion.* The demurrer to the petition will be overruled, and a writ will issue returnable December 11th, 1915, at 10 o'clock a. m.

November 26th, 1915.

M. T. DOOLING, Judge.

(Endorsed): Filed Nov. 26, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk." (Italics ours.)

(Transcript of Record, pp. 24-25.)

The ruling of the learned Judge of the Court below that: "The records here which accompany the petition show *no real evidence* against the petitioner" (Harry Katz), applies equally to the records which accompany the petition in the case against appellant, Joseph B. Katz. There is no real evidence against the appellant. "The affidavits are upon information and belief, and express only the opinions of the affiants."

EPITOME OF ALLEGED EVIDENCE AGAINST APPELLANT, JOSEPH B. KATZ, AND POINTS AND AUTHORITIES.

Harry Katz and Joseph B. Katz are brothers. Two separate warrants of arrest were issued against them, as well as two separate warrants of deportation. Separate affidavits claimed to support the warrants of arrest were presented against each of the brothers and separate preliminary hearings before the Immigration Officers were held as to each brother and thereafter the hearings of each brother were separately con-

ducted until the hearing held on September 2, 1914, (see exhibit "CCC," pp. 73-75, in volume containing original exhibits), when the alleged evidence against both brothers was jointly presented.

With reference to the appellant, Joseph B. Katz, (who is a barber at Colfax and has been for several years), the application for the warrant of arrest is dated February 27, 1914. The warrant of arrest against Joseph B. Katz is dated February 26, 1914. It will be observed, from a reading of the application for the warrant of arrest, that on February 25, 1914, a telegraphic application for the arrest of Joseph B. Katz had been sent from Colfax to Washington, D. C., by Immigration Inspector Griffiths.

The secret or preliminary hearing before Examining Inspector D. J. Griffiths was held March 6, 1914, at Angel Island, California. The first regular hearing, by which we mean a hearing at which the counsel for Joseph B. Katz were permitted to be present, was held May 8, 1914. The second regular hearing of the charges made against Joseph B. Katz was held on June 19, 1914, at Angel Island, California. The third and final hearing of the charges made against Joseph B. Katz was held on September 2, 1914, at Angel Island, California. At this third and final hearing, the charges against both the Katz brothers were jointly heard.

This preliminary explanation is made to avoid confusion to the Court and to opposing counsel in view of the somewhat voluminous records attached to the petition for a writ of *habeas corpus,* and contained in a separate volume, as already stated.

The warrant of arrest against Joseph B. Katz charges him simply and only with being an alien unlawfully within the United States in that he has been found receiving, sharing in, or deriving benefits from the earnings of a prostitute or prostitutes. (See Warrant of Arrest in Joseph B. Katz case, Exhibit "A," p. 1.) He was not accused, in the warrant of arrest, of having anything to do with the management of any house of prostitution. The warrant of deportation against Joseph B. Katz is based upon the same ground as that contained in the warrant of arrest. (See Warrant of Deportation, in Joseph B. Katz case, Exhibit "LL," p. 44.)

It is but fair to Joseph B. Katz to say that the record discloses that the only claim seriously urged by the Immigration Officials against him was that he was liable to deportation simply because he happened to be an alien-landlord of the premises used as a house of ill-fame. While the Act of March 26, 1910, does not specifically provide that an alien landlord of premises used for purposes of prostitution shall be subject to deportation, the Immigration Officials, with a display of considerable ingenuity, seized with avidity upon the words, contained in the Act of Congress of March 26, 1910: "Who shall receive, share in, or derive benefit from any part of the earnings of any prostitute." It was argued by them, and will undoubtedly be maintained before this Honorable Court by the United States Attorney, that, inasmuch as Joseph B. Katz admittedly was the landlord of the property used by one Nellie White as a house

of prostitution and as he received, as such landlord, *but in no other capacity,* a monthly rental of $25, for the rent of the premises, he was, in effect, receiving, sharing in, or deriving benefit from a portion of the earnings of a prostitute, the theory being that the $25 monthly rental paid to Joseph B. Katz purely as landlord by Nellie White must have been made up in part or in whole out of the earnings of one or more of the prostitutes frequenting the place.

It is clear, from this statement, that the only question seriously involved, upon the subject of the deportation of Joseph B. Katz, is whether a mere alien landlord, who simply receives a monthly rental for the use of his property, and does not receive said monthly rental in any other capacity than as landlord, that is, not as a maquereau, can be said to be within the inhibition and serious penalty of Section 3 of the Act of March 26, 1910, which renders liable to banishment: "any alien, * * * who shall receive, share in, or derive benefit from any part of the earnings of any prostitute."

This presents simply a question of law, and involves an interpretation of Section 3 of the amendatory Act of March 26, 1910, and the intent of Congress in that regard, which we have already fully discussed.

In this connection, it will be observed that Joseph B. Katz is not accused in the warrant of arrest, or adjudged guilty in the warrant of deportation, *as was his brother Harry Katz,* of having had anything to do with the management of the premises as a house of

prostitution. As to him, the charge contained in the warrant of arrest and the proofs, or rather alleged proofs, were limited, and raise a clean-cut question of law, as already indicated.

It is to be further noted, in connection with the application for the warrant of arrest against Joseph B. Katz and the issuance of the warrant of arrest against him that the name of one Nellie White is included in the application for, and the warrant of, arrest. Nellie White was never apprehended by the immigration authorities, and we have never and do not now represent her.

The record is devoid of a single affidavit from any of the unfortunate inmates of the place rented by Joseph B. Katz to Nellie White. Not a single woman is produced, not a single affidavit is obtained and submitted in the record in which any of the inmates complained that either Joseph B. Katz or Harry Katz ever, at any time, or place, whether in Colfax or elsewhere, received, or shared in, or derived any or the slightest benefit from her earnings as a prostitute.

There is an entire absence of any direct evidence against either of the two brothers to sustain any of the charges preferred against them in the warrants of arrest.

In the absence of any direct evidence against either of these two brothers, an heroic effort was made by a number of the good women and men of Colfax to rid that place of the house of prostitution run by Nellie White and rented from Joseph B. Katz, by preferring charges against both the Katz brothers to

the Immigration Officials, charges admittedly based upon information and belief, and endeavoring to deport the Katz brothers upon information and belief, hearsay, opinions, conclusions, surmises and conjectures; in other words, producing anything and everything except competent and legitimate evidence. An examination of the records before the Immigration Officials will bear out the truth of what we here maintain.

We contend, outside of the question of law applicable to the warrant of deportation against Joseph B. Katz, as to whether the mere fact of his being the landlord of property used for disreputable purposes makes him liable to deportation, that:

First: There is an absolute insufficiency of any alleged evidence, either in fact or in law, to support the warrant of deportation against Joseph B. Katz;

Second: That "information and belief," hearsay, opinions, conclusions, surmises or conjectures, or anything not recognized by the established rules of law as competent and legitimate evidence, can not be made the basis of a warrant of deportation;

Third: Unfairness of hearing in many particulars.

These contentions necessarily require an examination of the affidavits and other matters submitted to, and by, the Immigration Officials, in their recommendation and report to the Secretary of Labor asking for warrants of deportation against the Katz brothers.

In order to assist the Court as well as opposing

counsel, we prepared quite a comprehensive index of the numerous exhibits and other documentary matters appended to the petition and have minutely identified them for purposes of convenience. (See Index, Transcript of Record, pp. 14-18.)

Joseph B. Katz was charged upon a warrant of arrest (after having been arrested by telegraphic order at the request of Examining Inspector Griffiths) based upon *ex parte* affidavits—some 10 in number—made by a number of the good ladies of Colfax. These ladies also presented similar affidavits against appellant's brother, Harry Katz, which, as we have seen, were designated by the learned Judge of the Court below in his opinion in the Harry Katz *habeas corpus* proceeding as: "the affidavits are upon information and belief, and express only the opinions of the affiants." (See Opinion, Transcript of Record, p. 24.)

Examining Inspector Griffiths admitted, at the first public hearing of the charge against Joseph B. Katz held on May 8, 1914, (see Exhibit "X" in Joseph B. Katz's case, p. 28, of volume containing original exhibits), that these affidavits were nothing more than "information and belief" affidavits. They all appear to be carbon copies one of the other.

The following colloquy, between counsel for appellant and the Examining Inspector at the first public hearing, discloses:

> "(Mr. Woodworth): Now, if you agree that these affidavits are simply based upon information and belief, then we are satisfied to present counter affidavits, otherwise, if it is going to be claimed that they assert any facts of their own

knowledge, we want the privilege of cross examining these witnesses.

"(Inspector Griffiths): The affidavits were made before me, as stated in the bottom of the letter, on *information and belief.*"

(See record of proceedings at first public hearing, "Exhibit X," p. 28, of separate volume containing original Exhibits.)

Being such, they do not constitute any legitimate or competent evidence at all. While they may have been sufficient to justify the arrest of Joseph B. Katz, yet, upon the hearing, they were valueless as evidence and were inadmissible according to the rule laid down in *Hanges* v. *Whitfield,* 209 Fed. Rep. 675, and *Ex parte Lam Pui,* 217 Fed. Rep. 456. These authorities distinctly hold that, under the provisions of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, which authorize the arrest and deportation of aliens, who have lawfully entered the United States, for certain causes subsequently arising, *ex parte* affidavits and other documentary evidence may be taken *preliminary to, and as a basis for, an application* for a warrant for the arrest of an alien so charged, but such affidavits *can not be again used as evidence against him on his hearing after arrest,* at which he is entitled to be represented by counsel and to cross-examine the witnesses against him.

The opinion in these cases will be found to be very instructive and they consider in detail the rights of aliens arrested to be deported for causes arising subsequent to their entry into the United States.

After calling attention to the Immigration rules of November 15, 1911, especially rule 22 and the subdivisions thereof, which prescribe the procedure to be followed in deportation hearings, the learned Judge in the case of *Hanges* v. *Whitfield* says:

> "Testimony may, no doubt, be taken in the form of affidavits, *or otherwise,* preliminary to, and as a basis for, an application for warrants of arrest of specified aliens when the Immigration Officers are credibly informed, or have good reasons to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible against the aliens upon the hearing required to be given them after warrants for their arrest have been issued, to determine whether or not they shall be deported? * * * It is incumbent upon the Government to establish by *competent evidence* that the petitioners or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the Government; but it must be a *lawful proceeding,* the charge established by *competent evidence,* and the aliens afforded *a fair hearing* and *opportunity to discredit or disprove the evidence adduced against them.* Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, *with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported.*
>
> "The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth

in all disputed matters of fact; and it is indispensible in all judicial proceedings in this country, civil or criminal, that *ex parte* testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceeding to the party whom it is proposed to be used to cross-examine the witnesses giving such testimony, *cannot rightly be used against him.* 1 Greenl. Ev. (16th Ed.) 447; 2 Wigmore on Ev. 1361, 1365.

"In this case, it appears without dispute that the petitioners were not informed at any time of their right to counsel until *after* the inspector had taken the *ex parte* affidavits and examined the petitioners at length, when at the close of such examination he asked each, 'if he desired counsel.' Upon each answering that he did, the Inspector then fixed a time for the further hearing and postponed it accordingly. At such further hearing, counsel for the petitioners requested of the Inspector that the witnesses whose *ex parte* affidavits or statements had been previously taken be recalled that they might be cross-examined, which requests the Inspector denied. Some of the witnesses whose statements were taken by the Inspector were called by the petitioners but refused to testify unless the Inspector would so request, which request he refused to make. Others of the affiants the petitioners could not procure. *They were thus prevented from obtaining their testimony either upon direct or cross-examination. True, the petitioners and their counsel were permitted to examine the record, or copy of the testimony taken by the Inspector prior to the application for the warrant of arrest; but of what avail was that?* That testimony had already been forwarded to the Bureau of Immigration, and an inspector of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthful-

ness by legitimate cross-examination or otherwise. *That such testimony is legally admissible in any proceeding in which it is sought to deprive any person, citizen or alien, of his personal or property rights, cannot be successfully maintained.*

"It is contended on behalf of the Inspector that he is authorized under Rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, *it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States wherein it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of Immigration Officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported except upon legal evidence, which establishes with reasonable certainty, at least the charges upon which it is sought to deport them.*"

This case was affirmed by the Circuit Court of Appeals.

Whitfield v. *Hanges,* 222 Fed. 475.

See, also, the well considered case of *Ex parte Lam Pui,* a decision by District Judge Connor, 217 Fed. Rep. 456.

Among other rules of law ably discussed by that learned Judge, applicable to deportation proceedings, are the following:

"Text-writers and judges have undertaken to define the word 'evidence,' as applicable to judicial investigation, with more or less success.

Probably no more satisfactory definition is found, for practical purposes, than that given by Mr. Edward Livingstone:

> "'Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.' Draft, Code.

"It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. *It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue.* The industry of counsel affords a number of illustrative expressions of courts. In *People* v. *Van Zile,* 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

> "'Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'

"Judge Caldwell, in *Boyd* v. *Glucklich,* 116 Fed. 131, 53 C. C. A. 451, well says:

> "'The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.'

"It may be that, upon a full, fair hearing, in which petitioner has the benefit of counsel, and all of his rights secured to him, the government will be able to establish the charge made against him. I am of the opinion that such a hearing has not been had, and that no evidence has been adduced upon which the finding that petitioner procured his certificate by false and fraudulent representations can be sustained. These are the only questions presented upon this record.

"The petitioner is entitled to be discharged from custody. An order to that effect will be drawn."

Therefore, it is clear that these ten carbon-copy "information and belief" affidavits do not constitute any evidence whatever against Joseph B. Katz and their admission against him as a basis for the warrant of deportation deprived him of that full and fair hearing required by the law and regulations of the Department of Labor. These affidavits must be, therefore, eliminated from consideration. Outside of these "information and belief" affidavits, there is no competent or legitimate evidence to sustain the warrant of deportation.

We proceed, briefly, to a consideration of each one of the other affidavits and documents introduced against Joseph B. Katz, keeping in mind that they were also used against Harry Katz, his brother, and pronounced by the Court below as establishing "no real evidence" against him.

The next document, introduced against the appellant and used by the Immigration Officials in ordering his deportation, is an adverse report and recommendation of Examining Inspector Griffiths, made against the appellant and his brother Harry Katz, dated July 23, 1914. (Exhibit "HH," pp. 39-40; same Exhibit "LLL," pp. 91-92, in Volume containing original Exhibits.)

It should be explained, in this connection, that the cases against the Katz brothers were closed and submitted for the action of the Washington authorities on June 19, 1914. (See Exhibit "MM," pp. 45-47, of Volume containing original Exhibits.)

The records in both cases were sent on to Washing-

ton for consideration and action. Thereafter, the authorities in Washington expressed doubt as to the deportability of the Katz brothers upon the evidence then presented, and called, from the Commissioner of Immigration at Angel Island, for further evidence and investigation "into the managerial relation of the Katz brothers to the house of prostitution in that town, of which Nellie White was the madam, in February last." (See Exhibits "HH" and "CCC," *supra.*)

Insofar as this adverse report and recommendation purports merely to be an adverse report and recommendation it, of course, is unobjectionable as a matter of law, however false and fallacious may be the premises upon which it is based; but when this adverse report and recommendation purports to state certain matters, *as facts against the Katz brothers,* as the result of the private and secret investigations of the Examining Inspector, then it becomes an offensive and vicious document inadmissible in any court of justice in the land; it is clearly hearsay, information and belief, abounds in conclusions, opinions; the statements are those of a prejudiced and partisan officer; it is not sworn to; there is no cross-examination of the officer; he is not offered as a witness; such a document has no place in any proceeding, administrative or otherwise, where the liberty of a person is involved, especially where the penalty is as serious and irreparable as that of banishment.

Furthermore, the matters in the adverse report and recommendation stated as facts against the appellant

are not supported by any direct evidence or any evidence or circumstances testified to by witnesses, from which any just and legitimate inferences against the appellant can be drawn.

> *Ex parte Lam Fuk Tak,* 217 Fed. Rep. 468, 469.

In this connection, it should be stated that, when the officials at Washington ordered a re-investigation as to the managerial relation of the Katz brothers with reference to the place run by Nellie White, it was apparently directed to the ownership of the furniture and personal belongings in the house rented by Nellie White, the idea evidently being that, if the proofs showed that the Katz brothers had bought the furniture for the house, that would be evidence of the fact that they were connected with the management of such a place.

Outside of the conjectures and surmises of Examining Inspector Griffiths, and other matters stated by him, entirely unsupported by any evidence, it was affirmatively shown that neither one of the Katz brothers furnished the place, and that Joseph B. Katz had nothing to do with the place except in the mere capacity of landlord, such as paying water-bills, taxes, repairs, etc., as owner of the property.

The affidavit of George J. Meister, connected with the furniture store of Breuner & Company at Sacramento, effectually disposes of any pretense that the Katz brothers furnished the place as a house of ill-fame for Nellie White. (See Exhibit "KK," p. 43.)

His affidavit shows that Nellie White furnished the place herself. Both of the Katz brothers emphatically deny that they ever furnished the house for any such purposes.

As already stated, if the report of Examining Inspector Griffiths be regarded simply in the nature of a recommendation to his superior, the Commissioner of Immigration, no objection could be made to it on that ground. But, an examination of that report shows its unfairness to these Katz brothers in that it purports to report matters, *as proved facts against them,* when the record shows that not a single witness swears to any such facts. Further, the absurdity of the situation is realized and the unfairness of the whole proceeding appreciated when the record shows that Inspector Griffiths is the original investigator of the charges against the aliens; that he is the arresting officer; that he is the inquisitor; that is the Examining Inspector who has charge of the secret examinations and hearings; that he is the judge who make the recommendation to his chief, the Commissioner of Immigration. Such being the fact, how, in the name of justice, his report, containing statements of fact against the Katz brothers which he claims to have gathered from his investigations of a secret and private nature, can be dignified by the name of evidence is inexplicable to us. Such a proceeding is intolerable and a prostitution of justice itself. Its unfairness is obvious.

As was well said by District Judge Holt, in the frequently cited case of *United States etc.* v. *Williams,*

185 Fed. 598, 599, after referring to the usual procedure in deportation proceedings:

> *"It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. * * * The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge.* The secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceeding is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IN IT INVALID."

Such a report of the Examining Inspector, purporting to state *as facts* matters he claimed to have discovered in his investigations, not even being sworn to and the Inspector not offering himself as a witness so that he might be cross-examined, was eminently improper and deprived the appellant of that full and fair hearing guaranteed to every one by the laws of this country. As was well said, in *Ex parte Lam Fuk Tak,* 217 Fed. 468, 469, of a somewhat similar situation to that developed in the case at bar:

> "At this point the inspector put in a record: 'On the occasion of the visit to that laundry by the inspector in charge, on or about December 20, 1913, this Chinaman was found engaged in laundry work there—126 Market Street.' * * *
>
> "Except for the statement inserted in the record, *not under oath,* and doubtless without the

knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. *It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.*

"THE STATEMENT OF THE INSPECTOR MUST BE STRICKEN OUT AND DISREGARDED. THE FACT THAT IT IS INSERTED IN THE RECORD TENDS STRONGLY TO SHOW THAT PETITIONER WAS NOT GIVEN A FAIR HEARING. ELIMINATING THIS STATEMENT, THERE IS NO EVIDENCE UPON WHICH THE ORDER FOR DEPORTATION CAN BE SUSTAINED. LET THE PETITIONER BE DISCHARGED."

And in *Ex parte Plastino,* 236 Fed. R. 295, 297, it was said: "The statement of the inspector in this record, unsupported by oath, is not testimony. Even though it had been given under oath, it is not testimony which would be admitted in any Court, as it is the inspector's conclusion, etc."

The next document is the affidavit of Robert A. Peers, husband of Lucy F. S. Peers, the Secretary of the Committee of Fifteen. (Exhibit "DDD," p. 76.)

That affidavit refers principally to Harry Katz, appellant's brother, who, as we have seen, was discharged on *habeas corpus* because of the insufficiency of the proofs. This affidavit relates to matters occurring in

1909—five years prior to the arrest of appellant. We do not understand that the amendatory act of March 26, 1910, with its drastic penalties, under which it is sought to deport appellant, is retroactive.

U. S. v. *Tauji Suckichi,* 199 Fed. 750;
U. S. v. *Heth,* 3 Cranch 399, 2 L. ed. 479;
U. S. v. *Int. Mer. Co.,* 204 Fed. 702;
U. S. v. *North German Lloyd S. S. Co.,* 185 Fed. 158;
U. S. v. *North German Lloyd S. S. Co.,* 186 Fed. 672;
Hackfeld v. *U. S.,* 197 U. S. 442;
Moffitt v. *U. S.,* 128 Fed. 375.

The affidavit is worthless as competent or any evidence of any facts to support the deportation of either of the Katz brothers. The affidavit abounds in hearsay statements, conclusions, information and belief, and other rash and irresponsible statements, unworthy of the name of evidence. He says:

> "The affiant also avers that since that time (1909) the two brothers, Harry Katz and Joseph Katz, have conducted a house of prostitution on the property described as lot 1, block 2, additional survey of the town of Colfax and it is a well known fact in Colfax that the Katz brothers were interested in the management of this house of prostitution over which Nellie White, a notorious prostitute, presided as madam."

This statement simply represents the conclusions of the affiant that "they have conducted" and "it is a well known fact." The further statement: "The affiant avers that he has never heard these things denied until the arrest of Harry and Joseph Katz in 1914," is not

testimony of any fact. The mere fact that he never heard anything denied is no evidence of anything, especially when cross-examination is denied to the petitioners and no notice given of the taking of this affidavit. The affidavit further states that "he has frequently heard" and "it was generally understood by the people of Colfax."

Such rash and improper statements do not constitute competent or legitimate evidence upon which to base an order of banishment, especially when cross-examination is denied and no notice given of the taking of the affidavit.

The next affidavit is that of Lucy F. S. Peers (wife of the previous affiant) and the Secretary of the Committee of Fifteen formed to rid Colfax of houses of prostitution. (Exhibit "EEE," p. 77.)

This Honorable Court will observe that this is *only* the second affidavit made by the energetic Mrs. Peers to deport the Katz brothers. She made the first affidavit on February 24, 1914, hers being one of the ten "information and belief" affidavits in support of the application for a warrant of arrest. (Exhibit "J," p. 10.) The present affidavit is the second against the appellant. (Exhibit "EEE," p. 77.) In this affidavit she endavors to state an interview that occurred between herself and another affidavit-maker, Jeannie K. Lobner (see Exhibit "K," p. 11), and the local District Attorney, George W. Hamilton. Of course, at that interview neither H. H. Katz nor Joseph B. Katz were present, and yet the Immigration authorities courageously and remorselessly violated all

the rules of evidence in permitting an affidavit to be used against the Katz brothers wherein Lucy F. S. Peers states a conversation that she had with George W. Hamilton, the District Attorney of Placer County.

Not only are neither H. H. Katz nor Joseph B. Katz bound by what she or her affidavit-making-friend, Jeannie K. Lobner, said, to George W. Hamilton, but such statements are the rankest kind of hearsay testimony and inadmissible in any court of justice.

Aside from that, it is but proper to state that George W. Hamilton, the former District Attorney of Placer County, directly contradicts the second affidavits of Lucy F. S. Peers and of Jeannie K. Lobner, in an affidavit presented by him in behalf of the Katz brothers dated August 29, 1914 (Exhibit "MMM," p. 93.)

This affidavit of George W. Hamilton, in our judgment, so completely demolishes the absurd prosecution, attempted to be built up against the Katz brothers by the Committee of Fifteen, assisted by the over-zealous Immigration Officials and their special counsel, Attorney Frank V. Cornish, that we quote and set the same out in full:

"In re 12020/659. } H. H. Katz and
Katz Cases. } Joseph Katz.

State of California }
County of Placer } ss.

"GEO. W. HAMILTON, being first duly sworn, deposes and says: I am a resident of the City of Auburn, of the above county and state; an attorney at law therein, and have lived therein for over forty years, and practiced my profession

therein for the past twenty-five years, and am now residing and practicing law at that place; that my attention and notice has just been called to two certain affidavits made by Lucy F. Peers and Jeannie K. Lobner, dated, respectfully, July 31st, 1914, and that I had not, previously, any notice or knowledge thereof, and that as to the statements therein contained, and the facts in relation thereto, deponent, respectfully shows, alleges and represents as follows, to-wit:

"That in the month of August, 1913, I was the duly acting and qualified district attorney of said county and state, and that about that time I was visited, and besought by the ladies in question, to take some official action toward and directed at the abatement and discontinuance of two houses of prostitution located in the City of Colfax, in said County and State.

"That the said ladies stated and represented themselves to be members of a local committee known as and designated as the 'Committee of Fifteen,' with the intention of, and the purpose, for its organization and existence, of abolishing the above places.

"That both of the above named persons, in that interview showed themselves to be entirely ignorant of the provisions and requirements of the law, and in addition, advised and informed affiant that they intended to have the redress above, regardless of either the inclination or the disposition of the district attorney, if he were not inclined to pursue the course and procedure which they had devised to be followed therein.

"That affiant did in that, and other conversations, with the said ladies named, and other of the committee, use every honorable and reasonable argument and persuasion against their following out their alleged purposes, and explained that they could not, and would not be of assistance therein.

"That affiant gave them all the information

which he had, and assured them that he was convinced of the character of the houses, but that he did not then, or at any other time, use the names of any persons, other than the persons actually conducting the said houses, to-wit, Nellie White and Roma Burdell.

"That affiant had not then, and had never had any information, notice or advice that either H. H. Katz or Joseph Katz, were either the owners, or had otherwise to do with either of the said houses.

That as such district attorney, and in pursuit of my official duties, I had investigated said places, and while convinced of the character, I had never been advised that either of the houses were either directly or indirectly, or in the remotest degree or manner, sustained or maintained by either of the Katz brothers.

That the agitations of the Committee of Fifteen, of which Lucy F. Peers was the secretary, and Jeannie K. Lobner, the president, finally led to the formal presentation of the subject to the city trustees of the City of Colfax, the board of supervisors of the county, and the grand jury, and that each of these bodies publicly and formally acted thereon, and refused to take any action in the premises, and that it was not then, or at any of the public presentations of the subject, pretended or represented that the houses in question were contributed to, in any way, except by the above named persons, Nellie White and Roma Burdell, and at no time, except when this alleged charge against the above named Katz brothers was prepared, framed and presented to the federal authority, was there any pretense thereof.

That with the utmost respect to the names and social standing of the ladies who have made and presented the above affidavits, that their actions and conduct had been repudiated and condemned by every public body in Placer County, and that the same is disclosed by the public record thereof.

That it has been their open and avowed boast that they would ruin those who did not share their views, or oppose their efforts, and that invariably, and without exception, every local body and commission, and persons conversant and advised of the situation, and of the motives of its advocates, has repudiated and condemned the movement and the methods of the committee.

"GEO. W. HAMILTON.

"Subscribed and sworn to before me this 29th day of Aug., 1914.

(Seal) MARY H. WALLACE, Notary Public."

This affidavit explains, much better than we can, the entire situation at Colfax and the reason for the hatred and deep-rooted prejudice of the good ladies of Colfax against the Katz brothers.

The next affidavit, the *third* affidavit of Minnie G. Williams (Exhibit "GGG", p. 79), is the most remarkable of all of the affidavits or documents and reports presented against the Katz brothers and upon which warrants of deportation were seriously asked for. A reading of this remarkable affidavit, sworn to on July 29, 1914, will disclose to this Honorable Court to what lengths persons will go who, although their intentions are well meant and to be commended, are ignorant of the rules of evidence and of the laws of the land, and who are willing, in their zeal and partisanship, to prostitute justice itself to accomplish their aim.

This remarkable affidavit of Minnie G. Williams contains a mass of rash and irresponsible statements, many of which are clearly hearsay, others based on information and belief, conclusions, opinions, and

anything and everything except legitimate and competent evidence. In fact, the affidavit seems to be rather an argument in which the affiant does not hesitate to heap tirades of abuse on the Katz brothers. Minnie G. Williams has much to learn about the rules of law. She makes the astounding and revolting statement in her affidavit of July 29, 1914, that:

"INFORMATION AND BELIEF IS *ALL* THAT IS REQUIRED BY LAW."

Every other affiant, who seeks to deport the Katz brothers, seems likewise imbued with the idea that "information and belief is all that is required by law" to banish the Katz brothers. This view of the law seems to have been shared by the Immigration officials themselves, for they accepted these absurd and outrageous affidavits and acted upon them when ordering the deportation of the Katz brothers.

Not only does Minnie G. Williams, in this *third* affidavit, heap abuse upon the Katz brothers and indulge in such rash and irresponsible statements that the affidavit, so called, is not worthy of consideration at all as evidence against the Katz brothers, but she goes to the extent of upbraiding the inoffensive attorneys who happen to represent the Katz brothers and she says: "We pray that unscrupulous lawyers may not be permitted to juggle with the laws of the State and Nation—we pray that justice may be allowed to prevail." (Exhibit "GGG", p. 81.) Such irresponsible and ill-advised statements are the most convincing evidence of the unfairness of the hearings ac-

corded to the Katz brothers and of the fact that they were ordered deported, not on evidence, but on suspicion, conjectures, surmises, abuse, passion and prejudice. We cannot refrain from again quoting from the opinion of Judge Reed in *Hanges* v. *Whitfield, supra,* that the examination

> "must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them. * * * The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact. * * * It is contended in behalf of the inspector that he is authorized under rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States wherein it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of immigration officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, *except upon legal evidence, which establishes, with reasonable certainty, at least, the charges upon which it is sought to deport them.*"

District Judge Connor, in *Ex parte Lam Pui,* 217 Fed. 456, 465, after quoting from Judge Reed in *Hanges* v. *Whitfield* as above set forth, says:

> "Long, and frequently sad, experience teaches that when officers entrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved. If necessity, or the public safety, demands that swift, unusual, and summary methods of procedure be permitted, the power should be conferred by the people's representative in Congress in clear and unmistakable terms, and not by rules of departments conferring such power upon inspectors."

The next affidavit is that of Jeannie K. Lobner, also her *third* affidavit to secure the deportation of the Katz brothers (Exhibit "FFF," p. 78).

This affidavit is identical in language with that sworn to by Lucy F. Peers, also her *third* affidavit, to obtain the deportation of the Katz brothers (Exhibit "EEE," p. 77). In fact, they are probably carbon copies of one and the same affidavit. Jeannie K. Lobner, like Lucy F. Peers, pretends to state an interview that occurred between herself and the other affidavit-maker, Lucy L. Peers, and the local District Attorney, George W. Hamilton. Obviously, such affidavit is the grossest kind of hearsay and not binding on either of the Katz brothers, neither one of them being present.

The next affidavit is still another affidavit, the *fourth,* by Minnie G. Williams (Exhibit "HHH," p. 82). It is dated August 1, 1914.

This affidavit is on a par with all of the other affidavits. It cannot be dignified by the name of evidence. It is based upon such absurd statements as: "It was commonly understood;" "according to general repute;" "it is understood;" "it has generally been accepted as a fact;" "no one was ever heard to deny."

Furthermore, the same objection as to deprivation of right of cross-examination and failure to give notice of the taking of the affidavit is urged as is contended with reference to the other affidavits.

The next curious document purports to be a petition of certain of the citizens of Colfax, dated July 29, 1914, addressed to the Secretary of Labor (Exhibit "III," p. 83). This petition contains the names of all of the persons who had given affidavits, some of them as many, as we have seen, as four affidavits, against the Katz brothers, and perhaps a few others. *It is not even sworn to.* It is the rankest kind of an information and belief paper, and would be inadmissible in any court of the land or in any other proceeding, administrative or otherwise, save possibly an immigration proceeding, where anything and everything seems to be admitted and accepted by some Immigration Officials in order to deport persons whom they deem undesirable aliens. The appeal to the Honorable Secretary of Labor is couched in such expressions as: "It has been a matter of com-

mon knowledge that they were profiting by the earnings of prostitutes;" and: "We, the undersigned, again *affirm our belief* of the guilt of Harry and Joseph Katz."

It must be evident that the use of such a petition must have inflamed the Immigration Officials at Angel Island and had a deep prejudicial effect upon the Secretary of Labor and deprived the appellant of that full and fair hearing which "the eternal principles of justice and right" accords him. (Language used in *U. S.* v. *Redfern,* 180 Fed. 500.) The appellant and his brother are pictured as monsters and fiends, and such appeal could not have any effect other than to deeply prejudice their cause before the administrative officers at Angel Island and Washington, resulting in their unlawful deportation.

The next remarkable document, used against the Katz brothers, is a letter and brief, dated August 18, 1914, on the part of Frank V. Cornish, City Attorney of Berkeley, and special counsel for the Committee of Fifteen (Exhibit "JJJ," p. 85).

This brief is addressed to the Honorable Secretary of Labor and is in the nature of an appeal to the Honorable Secretary of Labor to deport the Katz brothers. It contains a severe criticism of the showing made by the attorneys for the Katz brothers. It purports to state *as facts matters not proved at all, either directly or by any just or legitimate inferences.* It furthermore apparently contains suggestions to the Examining Inspector or to the Commissioner of Immigration—certain suggestions as to what should be

incorporated in the adverse recommendations of the Examining Inspector and of the Commissioner of Immigration such as: "Insert for emphasis just after remarks about representative men" (Exhibit "JJJ," p. 88.) "Put in something about the men making affidavits being interested in saloons, or the friends of saloon men" (Exhibit "JJJ," p. 88).

This letter and brief of Attorney Cornish indulges in other severe invectives against the Katz brothers, but the great difficulty about the brief and letter is that it has no facts to support the abuse heaped upon the Katz brothers. Aside from that, we respectfully submit that it was improper to admit such a brief and letter against the Katz brothers; that the pernicious activity of the special counsel for the Committee of Fifteen deeply prejudiced the cause of the Katz brothers in the minds of the Immigration Officials, and effectually deprived them of a fair and impartial hearing; that there is no authority in the Immigration laws or rules of procedure for the employment and appearance of special counsel to assist the Immigration Officials; that such a practice is evidence *per se* of unfairness and is most reprehensible. That the use of such brief constituted an unfair hearing under the law declared in *Ex parte Lam Fuk Tak,* 217 Fed. Rep. 468, *469.*

Such documents, and such tactics, permitted by the Immigration Officials, to be used against the appellant and his brother, undoubtedly prevented them from having that full, fair and impartial hearing

which the laws of this country guarantee to the meanest and humblest person.

As was well said in *Ex parte Plastino,* 236 Fed. R. 2952, in a case involving deportation on the same charge of receiving, sharing in, or deriving benefit from the earnings of a prostitute, "Justice never hesitates in according a fair hearing; on the contrary, guarantees it to the worst criminal."

The next affidavit, and *the last,* is that of Edward H. Honn, made August 1, 1914 (Exhibit "KKK," p. 90). It is an exact duplicate of one of the many affidavits of Minnie G. Williams; perhaps a carbon copy; it is dated on the same day, to-wit, August 1, 1914. (Compare Exhibits "HHH" and "KKK," pp. 82-90.) It is subject to the same vices, such statements being permitted as "It was commonly understood;" "According to general repute;" "It is understood;" "No one was ever heard to deny."

We have thus, briefly, referred to every piece or particle of alleged evidence introduced against the appellant before the Immigration Officials and used by them as a basis for their warrant of deportation.

Without further elaborating upon the remarkable record presented, we respectfully submit that, as is so appositely stated by Judge O'Connor in *Ex parte Lam Pui, supra,* "mere suspicion, conjecture, speculation is not evidence."

On the part of the appellant, there was introduced before the Immigration Officials, as we have seen, the affidavit of George W. Hamilton, the local District Attorney, whose affidavit completely exonerates the

Katz brothers and explains the pernicious activities of the good ladies constituting the Committee of Fifteen at Colfax in endeavoring to rid that place of houses of ill-repute. Furthermore, there is the affidavit of George J. Meister, which refutes any suspicion that either of the Katz brothers had anything to do with the furnishing of the house operated by Nellie White. Besides that, are the affidavits of at least eight prominent citizens of Colfax, testifying to the character, good standing, industry and respectability of the appellant.

Having disposed of the proposition, that there is no evidence whatever worthy of the name to support the warrant of deportation, we also make the point that in the admission of the various affidavits, reports, documents, briefs, etc., the appellant was denied a fair and impartial hearing. That question has practically been considered and maintained in the previous pages of this Opening Brief. It is so interwoven with the absence of competent and legitimate evidence that to consider one is to consider the other.

We further invoke the doctrine enunciated in *Hanges* v. *Whitfield, supra,* and *Ex parte Lam Pui,* 217 Fed. Rep. 456, to the effect that the appellant was denied a full and fair hearing in failing to apprise him that he was entitled to the benefit of counsel at the *very outset* of the secret and preliminary hearing instead of at the *end* thereof, as disclosed by the record of the proceedings before the Immigration Officials.

As was said in *Ex parte Lam Pui,* 217 Fed. Rep., pp. 456, 465:

> "Just why the inspector failed to inform petitioner, before subjecting him to the examination, of his right to have, and an opportunity to procure, counsel, is not easy to understand. Such conduct is so utterly at variance with the course pursued by all judicial officers, both State and Federal, that it arrests the attention and jars the conception of fair procedure."

The same views were announced in *Ex Parte Plastino,* 236 Fed. R. 295, 297, as follows: "It was the right of the accused to be advised of the privilege of counsel *before* he was examined, and it is admitted that this information, if given, was not given until the examination was concluded."

Another point made by us is, that the appellant was denied the right of cross-examination as to the four or five affiants who gave affidavits at Colfax subsequent to the time of the issuance of the warrant of arrest against the appellant. We refer to the affidavit of Robert A. Peers, given on August 10, 1914; of his wife, Lucy F. Peers, given on July 31, 1914; of Jeannie K. Lobner, given on the same day; of two affidavits given by Minnie G. Williams, one on July 29, 1914, and the other on August 1, 1914; and the affidavit of Edward H. Honn, given on August 1st, 1914.

While we have already indicated that these several affidavits and other documentary evidence in the shape of secret reports and investigations, and briefs and letters, were all unworthy of the name of evidence and

do not contain any real facts upon which to base a warrant of deportation against the appellant or, for that matter, against his brother Harry Katz (as was held by the learned Judge of the Court below), upon the charges made against each of the brothers, still, as a matter of precaution, and for the purpose of demonstrating the absurdity, unreliability and falsity of the matters set forth in these several affidavits above enumerated, counsel for appellant, before the Immigration Officials, endeavored to seek a cross-examination of the affiants. This request was denied. It is to be observed that no notice whatsoever was given to the detained or his attorneys that any affidavits would be taken in Colfax and no opportunity whatever was given to be present at Colfax, at the taking of the affidavits in order to cross-examine the affiants. We complained that the hearings were not full and fair in being denied the right of cross-examination, or given a reasonable notice and opportunity to be present at the taking of the affidavits, afterwards introduced and used against the appellant by the Immigration Officials.

We contend that the appellant was effectually deprived of the right of cross-examination. We demanded the production of the affiants as soon as we were apprised of the existence of the affidavits, for the purposes of cross-examination, but this important substantial right was denied.

This method of procedure on the part of the Immigration Officials deprived appellant of a fair and impartial trial, as is held in the cases of *Hanges* v. *Whit-*

field, 109 Fed. 675, and *Ex parte Lam Pui,* 217 Fed. 456. Record of Proceedings, Exhibits "WW" and "CCC," pp. 63-64, 73-74.)

It is true that, after Examining Inspector Griffiths at the hearings held on June 19, 1914, as to both Katz brothers, had denied the request for the production of the affiants for the purpose of cross-examination, the Commissioner of Immigration saw fit, after the practical submission of the two cases, to address a letter to Marshall B. Woodworth, one of the attorneys for the Katz brothers, in the following vein:

> "Sir:
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> "Referring to the case of Dr. H. H. Katz, arrested under Department Warrant No. 53770/202, dated March 18, 1914, and Joseph Katz, arrested under Department Warrant No. 53770/1414, dated February 26, 1914, charging that these aliens have been found receiving, sharing in, or deriving benefits from the earnings of a prostitute or prostitutes, and in whose cases you demand that the witnesses be presented for the purpose of cross-examination by you, you are advised that there is no provision in the Immigration Law providing for the subpoenaing of witnesses. The case for the Government is submitted on affidavits aside from the direct testimony of the Katz brothers, and you as attorney for the defense have the privilege of submitting your case in a similar manner." (See Exhibit "SSS," p. 100.)

It is respectfully submitted that this letter of apology and explanation from the Commissioner of Immigration affords no defense or excuse for the failure of the Immigration Officers to give the ap-

pellant an opportunity to cross-examine these hostile witnesses. Whatever may be the condition of the law, which does not provide for the compulsory production of witnesses, still the Commissioner of Immigration, as a mere matter of *fairness* to the appellant, was in duty bound to notify him that the affidavits or the testimony of such and such witness was to be taken at Colfax or some other place at a certain and appointed time so that the appellant could have a legal representative there to cross-examine these witnesses, who were certainly hostile and prejudicial against appellant and his brother Harry Katz, as the record discloses.

In *Ex parte Ung King Seng,* 213 Fed. 119, it was held that a Chinese alien was not accorded a fair hearing before Immigration Officers, where her counsel was precluded by the Inspector from putting any questions on cross-examination to witnesses produced and examined against her.

Substantially the same injury is done to the Katz brothers by the Immigration Officers when they give no notice whatever that witnesses are to be examined against the appellant and thus preclude the attorney from being present to cross-examine. Especially is this true, where it appears that appellant on June 19, 1914, was led to believe that his case had been submitted and that there was no occasion for any further testimony against him.

Thereafter appellant was notified that additional affidavits had been secured against him and this necessitated a third and final hearing on September 2,

1914, at which additional affidavits and several documents and reports were introduced against him and his brother, without the slightest notice to them or to their attorneys of the fact that such affidavits would be taken and without the slightest opportunity to be present and cross-examine the affiants at Colfax or elsewhere.

At this final hearing on September 2, 1914, the attorney for the appellant and his brother again raised the point that the affidavits should not be admitted against the appellant and his brother because of the fact that they had been given no notice of the taking of the affidavits and no opportunity to cross-examine the affiants. This objection was overruled. What transpired may be best stated by quoting from the record of the proceedings at the final hearing held on September 2, 1914, at Angel Island, as follows:

> "Attorney Woodworth: Yes sir. It is also in the nature of a brief. Now at this time, and in accordance with previous requests made by us which were denied, and for the purpose of protecting the rights of the Katz brothers should *habeas corpus* proceedings become necessary, we ask for the production of those people for the purpose of cross-examination.
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> "Inspector Ainsworth: I will say in reply to that, Mr. Woodworth, that this office has no means by which any of the witnesses may be produced here for your cross-examination, but this office has no objection to your going to those witnesses and obtaining any statements from them that they see proper to give you.
>
> "Attorney Woodworth: As this is the final hearing of this matter, and we desire to have the cases closed and as we do not consider that the

affidavits contain any evidence worthy of the name—in other words, that the affidavits are based largely on hearsay, statements on information and belief, matters of opinion, and guess work on the part of the affiants, and as to repair to Colfax to cross-examine those witnesses at this late day would take much time and necessitate an expenditure of considerable money, we state that the offer now made and permission granted to cross-examine these witnesses is not of any practical value and we will submit the case on the evidence offered here, such as it is, claiming that it is not sufficient to show, in the first place, that Dr. H. H. Katz at any time was found connected with the management of a house of prostitution, or that he was found receiving, sharing in, or deriving benefit from the earnings of a single prostitute. We call the attention of the Honorable Examining Inspector and the Honorable Commissioner of Immigration to the fact that the matters with reference to Dr. H. H. Katz really relate to something that happened about five years ago, at any rate, previous to the amendment of 1910, amendment to the act of February 20, 1907. As to his brother, Joseph Katz, we admit that he owned the land and the house at the time the warrant of arrest was issued against him, but we contend that there is no evidence to show that he was found connected with the management of a house of prostitution or that he was found receiving, sharing in, or deriving benefit from the earnings of a single prostitute. It is true that he received $25 a month, but that was simply for the rent of the place and his relation to the place was simply that of landlord and tenant. In support of these two defendants we present the following affidavits, which we ask to be appropriately marked. They consist of affidavits presented in duplicate, those affidavits to be used in both cases, of Geo. W. Hamilton, District Attorney for the County of Placer, in which Colfax is

situated, in which he completely demolished, in our judgment, any semblance of evidence that may have been presented against the Katz brothers." (Exhibit "CCC," p. 74.)

The imperative necessity for some sort of notice, to be given to the appellant, is obvious, especially if it be true that a compulsory production of the witnesses against an alien cannot be had by the Immigration Officers. Otherwise, what protection has an alien charged with deportation? The privilege of going perhaps a long ways to cross-examine a witness, and perhaps many days or months after he has given his direct examination, is no privilege at all and practically robs cross-examination of its principal virtue, viz.: that of an immediate examination of the adverse and hostile witness *at the time that he makes the adverse and inimical statements.*

We cannot conceive how, under any aspect of the case presented to this Court, it can be claimed by counsel for respondent that the appellant or his brother had a fair and full hearing in being denied the right of cross-examination of the various hostile and adverse witnesses produced against them, and without the slighest notice that their statements would be taken, a considerable portion of the statements being taken without any notice to appellant or his counsel *after* it was announced that the cases had been closed and finally submitted for decision.

Hanges v. *Whitfield,* 209 Fed. 675;
Ex parte Lam Pui, 217 Fed. 456;
Ex parte Ung King Seng, 213 Fed. 119.

Aside from these several palpable violations of what should constitute a full and fair hearing, it is well settled that the burden of proof is on the Immigration Officials.

U. S. ex rel. Castro v. *Williams,* 203 Fed. 155.

It is not sufficient to raise a doubt.

U. S. v. *Hom Lim,* 214 Fed. 456.

One cannot be deported on insufficient or illegal evidence.

Ex parte Yabucania, 199 Fed. 865.

Immigration Officials cannot act arbitrarily in refusing to believe persons sought to be deported or their witnesses.

U. S. v. *Lee Chung,* 206 Fed. 367;
In re Jew Wing Toy, 91 Fed. 240;
Wong Chung v. *U. S.,* 170 Fed. 182, 95 C. C. A. 198;
U. S. v. *Leung Sam et al.,* 114 Fed. 702.

"In determining whether aliens are entitled to admission, the Immigration authorities act in an administrative and not a judicial capacity, and *must follow definite standards and apply general rules.*"

U. S. v. *Uhl,* 203 Fed. 152.

"Congress has seen fit to vest the final decision as to the right of aliens to enter the country in the Department of Commerce and Labor, but that department is governed by certain rules and regulations which must be *strictly construed* in conformity with the *eternal principles of justice and right.*"

"It is fundamental in American jurisprudence

that every person is entitled to a fair trial by an impartial tribunal."

U. S. v. *Redfern,* 180 Fed. 500.

In the case of *U. S.* v. *Williams,* 185 Fed. 598, 599, District Judge Holt, after stating the usual procedure in deportation proceedings says:

> *"It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense.* The person arrested does not necessarily know who instigated the prosecution. He is held in seclusion, and is not permitted to consult counsel until he has been privately examined under oath. *The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge.* The secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. *Aliens, if arrested are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceeding is* clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IN IT INVALID."

The Immigration Officers must strictly follow the rules, which rules must not be inconsistent with established law.

U. S. v. *Williams,* 185 Fed. 598;
Roux v. *Commissioner of Immigration,* 203 Fed. 413;
Hanges v. *Whitfield,* 209 Fed. 675;
Ex parte Lam Pui, 217 Fed. 456;

Ex parte Lam Fuk Tak, 217 Fed. 468;
United States v. *Lou Chu,* 214 Fed. 463.

In *Ex parte Lam Pui,* 217 Fed. 456, District Judge Connor said:

> "Those decisions establish the principle, so just and consistent with conceptions of American jurisprudence, that, before an alien admitted to the United States as a member of the exempt class can be deported, it must be shown by evidence, not merely suspicious circumstances or conjecture, that he has obtained such admission by means of fraudulent representations. Any other rule would be violative of elementary conceptions of justice and fair dealing. In the light of the language used by the courts, the validity of the return to the writ must be examined, not for the purpose of weighing or estimating the value of the evidence, but of ascertaining whether, when tested by well-settled principles, the examination had by the inspector constituted evidence upon which the Secretary of Labor had jurisdiction to order the deportation."
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> * * * * * * * *
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> "Long, and frequently sad, experience teaches that when officers intrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved."
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> * * * * * * * *
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> "Inquisitorial methods of fixing guilt upon persons do not commend themselves to the minds of American lawyers or laymen. They are contrary to the genius of our institutions."
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> "In *Harlan* v. *McGourin, supra,* Mr. Justice Day, quoting the language used in *Hyde* v. *Shine,*

199 U. S. 84, 25 Sup. Ct. 764, 50 L. Ed. 90, 'In the federal courts * * * it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his (petitioner's) discharge,' says:

"'In so stating, the learned justice * * * was but affirming the rule well established under section 1014 that there must be some testimony before the Commissioner to support the accusation in order to lay the basis for an order of removal; otherwise, the accused could be discharged upon *habeas corpus,* although the court could not weigh the evidence when the record shows that some evidence was taken.'

"In *United States* v. *Williams,* 200 Fed. 538, 118 C. C. A. 632 (C. C. A., 2nd Circuit), Judge Noyes wrote the opinion for the court. Judges Coxe and Ward, thinking that their views upon this point were not expressed clearly, concurring, said:

"'The opinion does not, however, make entirely clear our views upon a single point. We think that some evidence must be presented to justify a judgment of deportation and that conclusions of law must have some facts upon which to rest. The immigrant may, in a sense, have a fair hearing, although the conclusions drawn by the executive officers be wholly unsupported by proof.'

"Text-writers and judges have undertaken to define the word 'evidence,' as applicable to judicial investigations, with more or less success. Probably no more satisfactory definition is found, for practical purposes, than that given by Mr. Edward Livingstone:

"'Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.' Draft, Code.

"It is elementary that in judicial proceedings

> the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue. The industry of counsel affords a number of illustrative expressions of courts. In *People* v. *Van Zile,* 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:
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> " 'Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'
>
> "Judge Caldwell, in *Boyd* v. *Glucklich,* 116 Fed. 131, 53 C. C. A. 451, well says:
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> " 'The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.' "

In the leading case of *Low Wah Suey* v. *Backus,* 225 U. S. 460, it is said:

> "A series of decisions in this Court has settled that such hearings before executive officers *may* be conclusive *when fairly conducted.* In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were *manifestly unfair,* that the action of the executive officers were such as *to prevent a fair investigation* or that there was a *manifest abuse of the discretion* committed to them by statute." (Citing *United States* v. *Ju Toy,* 198 U. S. 253; *Chin Yow* v. *United States,* 208 U. S., p. 8; *Tan Tun* v. *Edsell,* 223 U. S. 673.) (Italics ours.)

In the case at bar, we contend that "the proceedings were *manifestly unfair;*" "that the action of the executive officers were such as *to prevent a fair investiga-*

tion;" and "that there was a *manifest abuse of discretion.*"

But, aside from these questions of irregularities, divesting the proceedings before the Immigration Officials of that fairness required by the law of the land, the all important proposition for which we contend is that there is no sufficient or competent evidence whatever to support the warrant of deportation issued against appellant.

Mere suspicion or conjecture will not suffice, and the deportation of an alien upon suspicion or conjecture will justify a court in concluding that the order of deportation was arbitrary and unfair. These were the views announced in *Backus* v. *Owe Sam Gow,* 235 Fed. R. 849, by this Circuit Court of Appeals. At the risk of repetition, we again quote the language of that opinion, which we deem apposite to the case now presented for consideration to this Court:

> "But mere suspicion or conjecture were not sufficient upon which to base a judgment * * * In the absence of the best evidence attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial inquiry. (Citing *United States* v. *Ju Toy,* 198 U. S. 253, *260,* 25 Sup. Ct. 644, 40 L. ed. 1140; *Chin Yow* v. *United States,* 208 U. S. 8, *12,* 28 Sup. Ct. 201, 52 L. ed. 369; *In re Chan Kan,* 332 Fed. 855, *857*—C. C. C.—and cases therein cited.)"

Therefore, if this Honorable Court should conclude, as we confidently believe it must, that there is no evidence to sustain the warrant of deportation, *or* that the appellant did not have that "full and fair

hearing" which the law and the rules and the decisions guarantee to an alien arrested on deportation charges, then the proceedings were "fatally irregular"; and the order of deportation based upon them was therefore *invalid;* and the present detention of appellant under such order and warrant of deportation *illegal;* and he is entitled to his absolute discharge as was held in the case of *United States* v. *Williams,* 185 Fed. Rep. 598, *604.*

As to the further question of law, whether appellant, being merely a landlord—an alien landlord—of property used as a house of ill-fame, subjects him to the drastic penalties of the Immigration laws as one who receives, shares in, or derives benefits from the earnings of prostitutes simply because he received $25 a month rent for the premises as landlord, BUT IN NO OTHER CAPACITY, we respectfully contend that such an interpretation was not intended by Congress and is violative of all the well settled rules of statutory construction, and that the decision of the Court below in that regard is incorrect and should be reversed, and the appellant discharged, upon the issuance of the writ of *habeas corpus* as prayed for in his petition.

Respectfully submitted,

MARSHALL B. WOODWORTH,
Attorney for Appellant.

S. LUKE HOWE,
Of Counsel.